Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. .....

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

MICHAEL SCHAEFER,
Appellant,
vs.
STATE ADMINISTRATIVE BOARD OF ELECTION LAWS,
Appellee.

On Appeal from the Circuit Court of the State of Maryland, County of Anne Arundel.

JURISDICTIONAL STATEMENT

MICHAEL SCHAEFER
723 St. Paul St.
Baltimore, MD 21202
(301) 332-0405

and

8840 Villa La Jolla Dr., # 112
La Jolla, Calif. 92037
(619) 450-0720

Appellant Pro Se

December 8, 1987

BEST AVAILABLE COPY

QUESTIONS PRESENTED

(1) Whether Art. 33, Sec. 16-5, Elections Code, Annotated Code of Maryland is repugnant to the United States Constitution in that it appears to grant an artificial advantage to political candidates having low-alphabetical surnames by according such candidates preferential ballot listing positions, denying equal protection of the laws to all other candidates for the same office?

(2) Whether award of costs against a citizen petitioning his government is repugnant to the citizen's rights to petition for redress of grievances as protected by the United States Constitution?

(3) Whether the happening of an election renders moot issues raised by a candidate that are capable of repetition in subsequent elections?

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(Amended Notice of Appeal Filed Nov. 19, 1987 by Mail).

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No. .....

In the Supreme Court

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OCTOBER TERM, 1987

MICHAEL SCHAEFER,
Appellant,

VS.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS,
Appellee.

On Appeal from the Circuit Court of the State of Maryland, County of Anne Arundel.

JURISDICTIONAL STATEMENT

Michael Schaefer, appellant, appeals from final judgment of the Maryland Court of Appeals denying petition for writ of certiorari, and substantive judgments of courts below holding that Maryland's alphabetical listing law used for determining ballot format in public elections was constitutional and not a denial of equal protection of the law, and that Schaefer was subject to payment of costs incurred by defending election officials.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland appears in the appendix hereto.

Opinion and Judgment of the Court of Special Appeals, and the Circuit Court of Appeals, dated May 1, 1987 and

August 28, 1986, respectively, are unreported opinions and are reprinted in full in appendix hereto.

JURISDICTION

Judgment of the Circuit Court of the State of Maryland granting summary judgment to appellee was filed August 28, 1986; appeal taken to the Court of Special Appeals, dismissed with costs awarded against appellant May 1, 1987; Motion for Reconsideration of said dismissal filed June 1, 1987, denied June 2, 1987; petition for writ of certiorari filed with Court of Appeals, denied in Order dated September 9, 1987.

This appeal is being docketed within 90 days from denial of petition for writ of certiorari by Maryland's highest Court. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> No state shall enforce any law which shall abridge privileges or immunities of citizens of the United States . . . nor deny to any person . . . the equal protection of the law.

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

Annotated Code of Maryland, Art. 33, Sec. 16-5, Elections Code:

In all elections, the names of candidates for every office shall be arranged alphabetically on the ballots of their party according to their surnames.

STATEMENT OF THE CASE

THE FACTS

Appellant Michael Schaefer, a Baltimore, Md. hotel owner and California lawyer, became one of eleven candidates for the Republican nomination for United States Senate to succeed retiring Senator Charles Mathias in Maryland's 1986 federal elections. Schaefer ran 2nd to Linda Chavez, with Chavez losing to Democrat nominee Barbara Mikulski in the general election.

Within a week of filing for office, Schaefer filed a civil complaint to enjoin certificate of candidates for the U.S. Senate nomination on an alphabetical basis, he being aware that 36 states utilized nonalphabetical procedures and desiring a chance at being at the top of such long list of candidates.

Temporary restraining order as to candidate certification was denied, the ballots were designed on an alphabetical basis, and on August 28, 1986 the Circuit Court granted summary judgment to defendant election officials, Judge James C. Cawood, Jr. finding that a position at the top of the ballot is desirable, that plaintiff's argument is best addressed to the Legislature, and whether applying a "rational basis" or "strict scrutiny" test, the Maryland system of alphabetical listing "passes constitutional muster".

Appeal to Court of Special Appeals was dismissed upon a finding of mootness, the election by then being history. Motion for Reconsideration as to mootness denied. Costs assessed against appellant. Petition to the Court of Ap-

peals seeking review of the constitutional issues, the mootness finding, and the costs assessment was summarily denied, the court finding insufficient showing of desirability or public interest to merit review. It is from such proceedings that timely appeal has been filed.

How The Federal Question Was Raised

Schaefer's civil complaint asserted that Maryland's alphabetical listing law was unconstitutional in that it denied equal protection of the law to plaintiff contrary to the United States Constitution, asserting an advantage inuring to candidates at the top of a ballot list and plaintiff's posture as being listed 10th out of 11 candidates.

It was raised in supplemental points and authorities filed prior to injunction hearing citing the cases discussed in argument elsewhere in this Jurisdictional Statement, in appeal to the Court of Special Appeals, and in petition for writ of certiorari addressed to Maryland's highest court. The First Amendment rights of appellant to petition his government without jeopardy of costs or retaliatory litigation was posed in petition for writ of certiorari to the Maryland Court of Appeals, and found to lack desirability or public interest for review. The Fourteenth Amendment rights of citizen candidates was also argued in said petition for writ of certiorari.

Federal constitutional claims have been considered and expressly rejected by the trial court (as to the Fourteenth Amendment), and by the Court of Appeals (as to First and Fourteenth Amendment assertions).

THE QUESTIONS ARE SUBSTANTIAL

Alphabet As Basis For Listing Candidates

Throughout the land there is inconsistency in both judicial decisions and legislative enactments as to this issue. Of our 51 jurisdictions, 14 continue to use the alphabet exclusively, 17 provide for rotation of candidate names, 8 utilize a lottery, 5 go by the filing date and 7 use other means or a combination of methods. The present system invites a candidate to change his or her name to Aardvark, thus topping any ballot list in 14 jurisdictions and gaining an advantage of up to 15% in opinion of election experts. Candidates with mid-alphabet names are perpetually consigned to being in the middle of any list of citizens seeking office. This is not the fundamental fairness that characterizes our administration of justice. There is inconsistency in federal elections.

In *Gould v. Grubb*, (1975) 14 Cal.3d 661, 536 P.2d 1337, 122 Cal.Rptr. 377, the California Supreme Court struck down the City of Santa Monica's charter provision providing that incumbents shall appear at the head of any ballot followed by other candidates in alphabetical order. Such procedure followed state statutes. The Court there found that any election procedure required "strict judicial scrutiny" and would survive challenge only if there was a "compelling governmental interest to protect". Appellant sees no government interest to protect other than possible convenience to election clerks in not having to deal with randomnizing procedures, or possible maintenance of an existing advantage enjoyed by incumbent officials having low-alphabetical surnames. California subsequently enacted *Elections Code Section 10217* to provide a randomized alphabet with rotation of names where an office included several political districts.

Statistical experts testimony has been adopted by several courts in their opinions on the status of alphabetical listing laws. In *Culliton v. Board of Election Commissioners,* (USDC-Ill. 1976) 419 F.Supp. 126, evidence indicated that "it would be a denial of equal protection to arbitrarily give candidates such a head start towards victory" specifically that a 3% advantage would create a 6% hurdle which other candidates must overcome.

This Court has held that the concept of equal protection of the laws has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to government action questioned or challenged; that a denial of constitutionally protected rights demands judicial protection". *Reynolds v. Sims,* (1964) 377 U.S. 533.

Alphabetical listing of candidates is followed by the states of Alabama, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Louisiana, Maine, Maryland, Mississippi, Nevada, Rhode Island and Tennessee. *Rotation* of candidate names exists in Alaska, Arizona, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Vermont and Wyoming. *Lottery* is used in Arkansas, District of Columbia, New York, Pennsylvania, South Dakota, Texas, Utah and Wisconsin. *Filing date* determines in Illinois, Missouri, Nebraska, New Jersey and Virginia. *Rotation and Alphabetical* combination is utilized by New Hampshire. *Rotary and Lottery* combination is used in California and West Virginia. *Other* procedures are followed by Massachusetts, New Mexico, South Carolina and Washington. (This information was provided by the *National Conference of State Legislatures.*)

The trial court found the Maryland statute constitutional "whether applying a 'rational basis' or a 'strict

scrutiny' test". Appellant submits that "strict scrutiny" is required of any law that provides artificial advantages to some candidates over others. The "rational basis standard is proper only as to 'purely mechanical details of the election process' having 'minimal impact on right to vote', a 'stricter standard' must be applied where the classification system has real and appreciable impact on equality, fairness and integrity of electoral process." *Libertarian Party v. Eu,* (1978) 83 Cal.App.3d 470, 147 Cal.Rptr. 888; *Gould v. Grubb, supra.*

If any of the Maryland courts had strictly scrutinized the challenged statute, it would not have passed "constitutional muster", and we would not be reviewing actions below.

There are decisions upholding use of the alphabet. *Clough v. Guzzi,* (D. Mass. 1970) 416 F.Supp. 1057 involved an asterisk mark advantage to an incumbent with the concept of alphabetical listing being secondary to the case.

In *Kautenburger v. Jackson,* (1958) 85 Ariz. 128, 333 P.2d 293, the court held that it was proper to interfere in the event the method prescribed by statute unconstitutionally discriminates in favor of one candidate against another, finding that "listing in alphabetical order deprives candidates of a fundamental right which was entitled to protection under the privileges and immunities article of the Constitution."

California's write-in ballot case, *Canaan v. Abdelnour,* (1985) 40 Cal.3d 703, 710 P.2d 268, 221 Cal.Rptr. 468, in which appellant served as petitioners' counsel, suggests an analysis method for election issues. The Court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

Amendment that plaintiff seeks to vindicate; it must then identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it must also consider the extent to which these interests make it necessary to burden plaintiff's rights.

Schaefer being consigned to 10th spot in a laundry list of 11 citizens seeking high office is burdened. Somebody must be in the 10th spot. But all candidates should have an opportunity to be on top, either in all voting districts, or in some of them, as happens when a rotation system is in effect.

And it's not just the candidates that are affected. The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters. *Anderson v. Celebrezze,* (1983) 460 U.S. 780, 789.

These waters are not unchartered. But they are at times conflicting and the success of a federal candidate with a mid-alphabet surname may depend on what state he runs in.

The standard of review utilized in voting and election cases, like the equal protection doctrine in general, has been in a state of flux. See *Gunther,* The Supreme Court, 1971 Term — Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection (1972) *86 Harv.L.Rev., pp. 1, 10-15.*

The Constitution is filled with provisions that grant . . . the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. *Williams v.*

Rhodes, (1968) 393 U.S. 23, 29. Justice Douglas, in his concurring opinion at page 39, noted "I would think that a State has precious little leeway in making it difficult . . . for citizens to vote for whomever they please". In the instant case, supporters of Schaefer would have to search through 11 names to find their candidate, and are somewhat likely to pick their 2nd choice if the 2nd choice's name pops into view . . . and the voter being allowed but one vote, Schaefer would miss out. Rotation is the fairest system, and combined with a random alphabet the California procedure offers perhaps the fairest that minds of man can conceive. *Calif. Elections Code Sec. 10217.*

Legislative bodies retain considerable discretion in devising regulations for the form and content of ballots . . . the exercise of such discretion remains subject to constitutional limitations. *Canaan v. Abdelnour, supra.*

A fundamental goal of a democratic society is to attain the free and pure expression of the voter's choice of a candidate. To that end, our federal Constitution mandates that the government must, if possible, avoid any feature that might adulterate or, indeed, frustrate, that free and clear choice. *Gould v. Grubb, supra.*

The power of the state to regulation elections must be exercised consistent with dictates of Equal Protection clause of the Fourteenth Amendment. *Sangmeister v. Woodard,* (CA-7, 1977) 565 F.2d 460. This case upheld the trial court's conclusion that alphabetical placement on ballots provided an advantage.

Election questions are usually substantial questions. When large numbers of candidates in many jurisdictions are affected, the issue is of particular significance. When there is an advantage, no matter how slight, that processes of government have in their machinery the

ability and capacity to remedy, need for attention is evident. The aspiration of every candidate should be to do battle on a level playing field. Inaction by the courts maintains a status quo that numerous appellate courts have condemned. The alphabet has its place, but not in determining which citizens have favored position in presenting their candidacy to their constituency.

Citizens' Immunity in Petitioning Government

Citizens should be encouraged to petition their government without fear of reprisal, jeopardy, or retaliation. Citizens have little or no control over costs incurred by a government of sometimes unlimited resources to defend. To allow the government, after defeating a citizen's claim, to pursue civil actions for abuse of process, or to levy substantial costs bill, has a "chilling" effect on the citizens' access to government.

In *City of Long Beach v. Bozek,* (1982) 31 Cal.3d 527, 645 P.2d 137, 183 Cal.Rptr. 86, the California Supreme Court held that a citizen challenging his government could not be sued for malicious prosecution. This Court, in Case No. 82-353, January 10, 1983, remanded the case to the California court to determine if its action was based on federal or state constitutional grounds; the California court deciding it was based on both. The court found that "the right to petition for redress of grievances protects attempts to obtain redress through all three branches of government" and that such actions "would generate a potential chilling effect of considerable dimension on exercise of the right to petition the government through the courts". It is essential to protect the ability of those who perceive themselves to be aggrieved by the activities of governmental authorities to seek redress. If cities are permitted to recover against those who have

unsuccessfully sued them, the institution of legitimate as well as baseless legal claims will be discouraged. It is not unlikely that even good faith claimants would forego suit in order to avoid the possibility of having to pay city fees should their action against the city prove unsuccessful. *Id.*

This question is substantial because it affects every citizen who questions a practice of local, state or federal government. Citizens are protected by the *First Amendment* as to their right to complain. And no state can infringe upon that right by raising financial hurdles. At any stage of any proceeding. And more importantly, in cases affecting large numbers of people, and being in the public interest.

Mootness

This Court has previously rejected dismissal of an action based on an election having come and gone. In *Moore v. Ogilvie,* (1969), 394 U.S. 814, 816, the Court noted that the election had been held, but that the problem is "capable of repetition, yet evading review", the burdens placed on the candidates remains, and controls future elections. "We then turn to the merits".

Such was argued in a supplemental point and authority to the Court of Appeals, on the question of dismissal for mootness by the court below, without avail.

Election litigation does not arise in a vacuum. There is an ongoing pressure to prepare election materials, with election officials claiming prejudice as to any delay. Maryland has not evaluated this issue further than a summary judgment hearing. Appellant may be a candidate again. Maryland will be conducting federal and nonfederal elections in the future. Election cases are an exception to the

mootness doctrine. It is important for this Court to so declare.

The "capable of repetition" requirement for exception to mootness, for cases capable of repetition yet evading review, requires the Court of Appeals to determine whether there is a demonstrated probability of reasonable expectation, as distinct from mere physical or theoretical possibility, that the conduct complained of will recur, thereby keeping the matter susceptible to judicial resolution. *New Jersey Turnpike Authority v. Jersey Central Power & Light*, (C.A.-3 N.J., 1985) 772 F.2d 25.

The Court of Special Appeals should have decided the issue on the merits. Constitutional rights were swept under the rug.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

December 7, 1987

Respectfully submitted,

MICHAEL SCHAEFER
723 St. Paul St.
Baltimore, MD 21202

and

8840 Villa La Jolla Dr., #112
La Jolla, Calif. 92037

Appellant Pro Se

APPENDIX A

IN THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY

Case No. 3108919

MICHAEL SCHAEFER
Plaintiff
VS.
STATE ADMINISTRATIVE BOARD
OF ELECTION LAWS, et al.
Defendants

OPINION AND ORDER

As long as there has been a written language there has been an alphabet. By the second or third grade, every student has been trained in arranging words in alphabetical order. In this interesting case we are asked to declare unconstitutional the use of the alphabet as sole guide in preparing the ballot for Republican nominations for the United States Senate, and by inference, in preparing the entire ballot. While we find that Plaintiff's argument is an interesting one, we believe it is best addressed to the Legislature and not to this Court. Accordingly, we give him the proverbial "A" for effort and decide against him.

Michael Schaefer, a candidate for nomination in the Republican Senatorial Primary, asked us to enjoin the use of an alphabetical ballot in the September primary. On July 8, 1986, we heard and denied a request for preliminary injunction. Thereafter counsel for the State Defendants moved for summary judgment. Plaintiff indicated that he would also move for summary judgment but was unable, because of time constraints, to do so. Such causes

no prejudice, as we are disposed to grant Defendants' Motion for Summary Judgment in any event.

The only possible material issue of fact is the desirability of a position at the top of the ballot. For the purposes of this Motion we accept this postulate as true, thereby avoiding a lengthy discussion of judicial notice. We then turn to the two cases which discuss the issue, *Gould v. Grubb,* 536 P.2d 1337, 122 Cal.Rptr. 377, and *Clough v. Guzzi,* 416 F.Supp. 1057 (D.Mass.).

While on point, both cases are more concerned with the treatment of incumbents than with alphabetical listing. In the California case, a charter provision of the City of Santa Monica, embodying the State Electoral Code, provided that incumbents shall appear at the head of any ballot in alphabetical order, followed by other candidates in the same order. The Massachusetts Statute construed by the three-judge bench in *Clough v. Guzzi, supra,* was similar. The two courts reached diametrically opposite conclusions; the State Court finding both the alphabetical and incumbency provisions unconstitutional and the Federal Court deciding that both were permissible.

The preferential placing of incumbents might well present a closer case, but it is not involved here. Alphabetical order has been commonly accepted for listing of people since the history of the alphabet, and was the way all or almost all ballots were originally set up. According to the figures given us, about 30% of the States still use it. Others use rotation, lottery or a combination thereof. It is important to distinguish between the desirable and the constitutional, the preferable and the mandatory. Substituting the words "alphabetical arrangement" for "incumbency", we accept the logic of *Clough v. Guzzi, supra:*

> "The fact that some statistical advantage may at the same time accrue to one of the candidates by virtue of his or her incumbency does not for constitutional purposes invalidate that otherwise legitimate purpose, especially where that advantage remains problematic and variable from election to election. And whether for purposes of a more absolute fairness that advantage warrants a different statutory scheme is properly a legislative consideration. We therefore hold that the Massachusetts statutes are constitutionally permissible under the equal protection clause of the fourteenth amendment." 416 F.Supp. at 1068.

Whether applying a "rational basis" or "strict scrutiny" test, we think the Maryland system of alphabetical listing passes constitutional muster, and leave to other bodies the equally interesting question of whether it ought to be changed as a matter of policy.

Accordingly, it is by the Court, this 28th day of August 1986,

ORDERED, that Plaintiff's Motion for Summary Judgment be and it is hereby granted, and judgment is entered on behalf of the Defendants with costs.

JAMES C. CAWOOD, JR., Judge

Copies to:
Michael Schaefer
Paul E. Sullivan, Esquire
Linda H. Lamone, Esquire
Nicholas T. Nonnenmacher

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
No. 1418
September Term, 1986

MICHAEL SCHAEFER
v.
STATE ADMINISTRATIVE
BOARD OF ELECTION LAWS, et al.

GILBERT, C.J.
BELL, ROSALYN B.,
KARWACKI,
JJ.

PER CURIAM

Filed: May 1, 1987

The appellant, Michael Schaefer, and ten other persons filed certificates of candidacy in the 1986 primary election for the Republican nomination for the office of United States Senator from Maryland.[1] Md. Ann. Code art. 33, § 16-5(a) requires that "the names of candidates . . . be arranged alphabetically on the ballots of their party according to their surnames. . . ." In the resulting configuration of names in the September 9, 1986, primary election for the Republican nomination, Mr. Schaefer was listed tenth from the top on ballots with vertical listing (punchcard system and absentee ballots), at the botton of the first of three columns of names on the Shoup Voting Machine (ballot laid out vertically), and at the top of the

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[1]Ten Democrats filed certificates of candidancy for the Democratic nomination. Nine of those persons were placed on the ballot in the 1986 primary election.

last of four columns of names on the Automatic Voting Machine (ballot laid out horizontally).[2]

Slightly more than sixty days before the primary, Mr. Schaefer, in the Circuit Court for Anne Arundel County, filed a complaint against the State, the State Administrative Board of Election Laws (SABEL), the Administrator of that Board, and the other candidates for the Republican nomination. The action against the other Republican candidates was later voluntarily dismissed. Schaefer's complaint alleged that § 16-5(a) is "unconstitutional, in that it denies equal protection of the law to [Mr. Schaefer] . . . ." He asked the court

> "[to] declare [§ 16-5(a)] unconstitutional and order election agencies and officials to proceed in a manner consistent with plaintiff's constitutional rights . . . ; [to issue] a permanent injunction enjoining and restraining defendant agency and official from certification of candidates in an alphabetical manner as to election of Republican Nominee for U.S. Senate in the September 9, 1986 primary election . . . ; [and he moved] for issuance of an interlocutory or preliminary injunction forthwith, upon hearing, to restrain and enjoin said agency and official from certification of candidates in any manner of ballot listing other than one designed to assure fairness and impartiality as to plaintiff . . . ."

The matter was heard before Judge James C. Cawood Jr. on July 8, 1986. Mr. Schaefer asked the court to "find [§ 16-5(a)] unconstitutional, as applied to the facts

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[2]Md. Ann. Code art. 33, § 16-5(b) states that "[i]f two or more columns . . . are used for the names of candidates for the same office, the same number of names, so far as possible, shall be printed in each column. . . ."

before the Court . . . ." Judge Cawood denied the motion. The appellees moved for summary judgment. Judge Cawood granted that motion on August 28, 1986. The primary election was held on September 9, 1986. Mr. Schaefer, who was unsuccessful in the election, filed this appeal from the August 28, 1986, judgment.

Appellees move to dismiss this appeal on the grounds that the appellant's brief was "filed . . . late" and that the appellant did not comply with Md. Rule 1028 regarding the printed record extract.

The parties stipulated to an extension of the February 9, 1987, date for filing the appellant's brief "by an amount of time necessary for transmission . . . by United States Mail from California to Maryland." Schaefer's brief was to be mailed by February 7, 1987, but it was not mailed until February 9. It was filed with this Court on February 19. The appellees allege that the filing was "ten days late," but the only variation to the stipulation is that the brief was deposited in the mail two days late. In any event, the brief was filed, as Md. Rule 1030 c.l. requires, at least thirty days before the case was scheduled for argument on April 21, 1987. Insofar as there were any violations of Md. Rule 1028, the appellee corrected the deficiencies in the appellant's record extract. *Burdette v. LaScola,* 40 Md. App. 720, 736 (1978), *cert. denied,* 284 Md. 745 (1979). At oral argument the State withdrew its motion to dismiss this appeal.

We turn now to the issue raised:

> "Does Maryland's 'alphabetical listing law' violate Equal Protection of the Law guarantees of the Maryland and United States Constitutions?"

The question as presented to and decided by the circuit court, however, was whether § 16-5(a) is "unconstitu-

tional, as applied to the facts before . . . [that] Court." We shall address the appellant's question in its narrower form since it relates to the judgment from which this appeal was taken. *See* Md. Rule 1085.

> "Generally, appellate courts do not decide academic or moot questions. A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide."

Attorney General v. Anne Arundel County School Bus Contractors Association, Inc., 286 Md. 324, 327 (1979), quoted in *Mercy Hospital, Inc. v. Jackson,* 306 Md. 556, 561 (1986), *rev'g* 62 Md. App. 409 (1985).

The primary election of September 9, 1986, has long since taken place. Based on the particular relief sought, as described *supra,* no controversy currently exists between the parties; no effective remedy is possible; and the question raised has become moot. *Dudley v. State Roads Commission,* 224 Md. 613, 618 (1961); *Iverson v. Jones,* 171 Md. 649, 652-53 (1936).

When a case becomes moot, we should dismiss the appeal without expressing our views on its merits. *Mercy Hospital, Inc. v. Jackson,* 306 Md. at 562; *see* Md. Rule 1035 b.8. In "rare instances which demonstrate the most compelling of circumstances," we may depart from the general rule and decide issues raised by a question that has become moot. *Reyes v. Prince George's County,* 281 Md. 279, 297 (1977).

The Court of Appeals in *Mercy Hospital, Inc. v. Jackson,* 306 Md. at 562-63, quoting *Lloyd v. Board of Supervisors*

of Elections of Baltimore County, 206 Md. 36, 43 (1954), stated the criteria for deviating from the general rule:

> "[O]nly where the urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest, will there be justified a departure from the general rule and practice of not deciding academic questions. . . . [I]f the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these facts concur with sufficient weight."

Of those criteria, the single one that is pertinent to the matter *sub judice* is that pertaining to a recurrence of a suit similar to that of Mr. Schaefer's. That is, one which "will involve a relationship between government and its citizens, or a duty of government." With regard to that particular criterion, Judge Hammond (later Chief Judge) opined for the Court in *Lloyd v. Board of Supervisors of Elections of Baltimore County.*

> "[A] matter may be said to be of general public interest only in the sense that any statute is, which involves the whole state. Moreover, it does not seem likely that it will recur with any frequency, and if it does again present itself, there need be no difficulty in having it passed upon by this Court as a live issue."

206 Md. at 43-44; *cf. In re Criminal Investigation No. 1-162*, 307 Md. 662, 680-83 (in the Court's opinion, the above criteria were met), *vacating on other grounds* 66 Md. App. 304 (1986). What Judge Hammond said in *Lloyd* is equally applicable to the instant case. If, by happenstance, the issue ever again arises, there would be no difficulty in having it resolved in a timely fashion as a viable issue. As it now stands, however, it is moot and must be dismissed. Md. Rule 1035 b.8.

APPEAL DISMISSED.

COSTS TO BE PAID BY APPELLANT.

MANDATE

Court of Special Appeals

No. 1418, September Term, 1986

MICHAEL SCHAEFER

v.

STATE ADMINISTRATIVE BOARD OF ELECTIONS LAWS et al

JUDGMENT: May 1, 1987: Per Curiam filed. Appeal Dismissed. Costs to be paid by appellant.
June 1, 1987: Motion for Reconsideration filed by appellant.
June 2, 1987: Motion for Reconsideration denied.
June 2, 1987: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for ANNE ARUNDEL COUNTY
3108919

Record	40.00
In Court of Special Appeals:	
Filing Record on Appeal	50.00
Printing Brief for Appellant	62.40
Reply Brief	57.60
Printing Brief for Appellee	153.60
Portion of Record Extract — Appellee	705.60

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, the second day of June, A.D. 1987.

Herman E. Frieden
Clerk of the Court of
Special Appeals of Maryland

IN THE COURT OF APPEALS
of MARYLAND

MICHAEL SCHAEFER

v.

STATE ADMINISTRATIVE
BOARD OF ELECTION LAWS et al.

Petition Docket No. 213

September Term, 1987

(No. 1418 September Term, 1986
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: September 9, 1987

BEST AVAILABLE COPY

IN THE CIRCUIT COURT OF
THE STATE OF MARYLAND
IN AND FOR THE COUNTY OF ARUNDEL

No. 3108919

MICHAEL SCHAEFER
Plaintiff

VS.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS; MARIE M. GARBER, Administrator; STATE OF MARYLAND
Defendants

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that plaintiff appeals from denial of petition for certiorari filed by the Court of Appeals September 9, 1987, and from substantive judgments of the Circuit Court for Anne Arundel County entered August 28, 1986 and judgment of the Court of Special Appeals entered May 1, 1987. Appeal is filed pursuant to Title 28, United States Code, sec. 1257(2).

Dated: November 19, 1987

MICHAEL SCHAEFER
Plaintiff Pro Per

CERTIFICATE OF SERVICE

Michael Schaefer, a member of the Bar of the United States Supreme Court, certifies that all parties required to be served have been served with copy of this Amended Notice of Appeal to the Supreme Court of the United States, said service being by mail, postpaid, to J. Joseph Curran, Jr., Attorney General, Linda H. Lamone, Assistant Attorney General, 90 State Circle, Suite 104, Annapolis, Md. 21401-1991.

Dated: November 19, 1987

MICHAEL SCHAEFER, ESQ.
723 St. Paul St.
Baltimore, Md. 21202
& 8840 Villa La Jolla Dr. #112
La Jolla, California 92037

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 8, 1987, I served the within Jurisdictional Statement in re: "Michael Schaefer vs. State Administrative Board of Election Laws" in the United States Supreme Court, October Term 1987, No.....;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

J. Joseph Curran Jr. Attorney General
Linda H. Lamone, Assistant Attorney General
90 State Circle, Suite 104
Annapolis, Maryland 21401-1991

All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 8, 1987, at Los Angeles, California

CE CE MEDINA

Supreme Court, U.S.
FILED
JAN 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1003

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL SCHAEFER,

Appellant,

v.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS AND STATE ADMINISTRATOR OF ELECTION LAWS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND AND THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY (MARYLAND)

MOTION TO DISMISS

J. JOSEPH CURRAN, JR.,
Attorney General of Maryland,

RICHARD E. ISRAEL,
ROBERT A. ZARNOCH,
(Counsel of Record)
Assistant Attorneys General,
90 State Circle
Annapolis, Maryland 21401,
(301) 858-3889,

Attorneys for Appellees.

The Daily Record Co., Baltimore, MD 21202

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether a constitutional challenge by an unsuccessful U. S. Senate candidate in the Republican primary to the application of a State law requiring the alphabetical listing of candidates was correctly dismissed as moot where the plaintiff essentially sought only injunctive relief as to his own candidacy in the 1986 primary election?

2. Whether a substantial equal protection question is raised by the application of Maryland's statutory requirement that the names of candidates for elected office be arranged alphabetically on the ballot?

3. Whether the assessment of $1,069.20 in appeal costs, most of which consisted of charges for printing a brief and record extract, against a non-indigent litigant in an election law challenge, raises a properly presented and substantial federal question under the First and Fourteenth Amendments of the U. S. Constitution?

PARTIES

In addition to the State Administrative Board of Election Laws and the State Administrator of Election Laws, Appellant Schaefer initially named as defendants below the other ten U. S. Senate candidates in the Republican primary: Linda Chavez, Monroe Cornish, Howard D. Greyber, George Haley, Abraham H. Kalish, Nicholas T. Nonnenmacher, Melvin Perkins, Horace Stuart Rich, Herbert Stone Rosenberg, and Richard Sullivan. On July 31, 1986, Schaefer moved for dismissal of the defendant candidates, although no order was entered dismissing these persons as parties. On August 28, 1986, candidate Chavez answered the complaint in the Circuit Court for Anne Arundel County. None of these candidates participated in the subsequent appellate proceedings.

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No. 87-1003

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MICHAEL SCHAEFER,

Appellant

v.

STATE ADMINISTRATIVE BOARD OF ELECTION LAWS and STATE ADMINISTRATOR OF ELECTION LAWS,

Appellees

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND AND THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY (MARYLAND)

MOTION TO DISMISS

Appellees, State Administrative Board of Election Laws and State Administrator of Election Laws ("the State"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the appeal of Michael Schaefer of the judgment of the Circuit Court for Anne Arundel County

upholding the constitutionality of Article 33, §16-5(a) of the Maryland Code (dismissed as moot by the Court of Special Appeals of Maryland, with subsequent review by certiorari denied by the Court of Appeals) be dismissed for lack of jurisdiction or, alternatively, for want of a substantial federal question. If the Court of Appeals' refusal to entertain the issue of the recognition of a First Amendment immunity from the payment of appeal costs awarded under Maryland Rule 1082(a) is deemed properly presented and appealable under 28 U.S.C. §1257(2), the State also moves that this appeal be dismissed for failure to present a substantial federal question.

OPINIONS BELOW

The August 28, 1986 Opinion and Order of the Circuit court, the May 1, 1987 opinion of the Court of Special Appeals, and the

September 9, 1987 order of the Court of Appeals denying certiorari are found in the Appendix to Appellant's Jurisdictional Statement (A.J.S.). The last order is also noted in 310 Md. 491, 530 A.2d 273 (1987). Not included in Appellant's Appendix are the transcribed oral opinion and a July 8, 1986 order of the Circuit Court denying Appellant's request for an interlocutory injunction and a June 2, 1987 order (letter) of the Court of Special Appeals denying Appellant's motion for reconsideration.

JURISDICTION

The Appellant invokes jurisdiction under 28 U.S.C. §1257(2). The State contends that Schaefer's equal protection challenge to Article 33, §16-5(a) of the Maryland Code is moot and, thus, appellate jurisdiction is lacking as to that claim. In addition, the issue of the candidate's First Amendment challenge to the award of appeal costs under

Maryland Rule 1082(a), if properly presented, would appear to be reviewable under 28 U.S.C. §1257(3), not §1257(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Pertinent provisions of the United States Constitution and the Maryland Election Law are set forth in the Appellant's Jurisdictional Statement (J.S.). Also relevant to his First Amendment claim are the following provisions of Chapter 1000 of the Maryland Rules of Procedure (Appeals to the Court of Special Appeals):

Rule 1081 a.

> In taxing the costs in a case the Clerk shall include the allowance determined pursuant to section b of this Rule for printing the briefs, the record extract, and any necessary appendices to briefs, the amount, if any, paid by the appellant for the original and the copies of the stenographic transcript of testimony furnished pursuant to section a 2 of Rule 1026 (Record on Appeal), and the cost of printing a motion to dismiss if the motion is granted.

Rule 1082 a.

> In all cases in this court the awarding of costs shall be in the discretion of this Court, but unless it is otherwise ordered by this Court costs shall be awarded against the losing party.

Rule 1082 c.

> When unnecessary matter has been included in a record extract or appendix or when a brief, appendix, or record extract has not been printed in accordance with section a of Rule 1031 (Style and Contents of Brief), the costs of printing may be withheld or divided as this court may direct.

STATEMENT OF THE CASE

In the State of Maryland, in 1986 some 2,700 candidates for public office filed to run in more than 1,000 election contests. The offices to be filled ranged from federal posts, such as U. S. Senate, to State-wide offices, such as Governor and Attorney General, to distinctly local offices, such as school boards and registers of wills. Eleven candidates sought the Republican nomination for a U. S. Senate seat to be voted on in the September 9, 1987, primary. Pursuant to §16-

5(a) of Article 33 of the Maryland Code, they were all slated to be listed alphabetically on the ballot according to their surnames.

On July 3, 1986, one of those senatorial candidates, Appellant Schaefer, filed a "complaint for injunction" and "motion for preliminary or interlocutory injunction" alleging that §16-5(a) denied him equal protection of the laws. He sued only in his own name and on behalf of his own candidacy; he was not joined in his lawsuit by supporters, associates or voters; he did not file a class action. His prayer for relief sought a permanent injunction enjoining and restraining the State "from certification of candidates in an alphabetical manner as to election of Republican Nominees for U. S. Senate in the September 9, 1986 primary throughout the State of Maryland." 1/

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1 Although a paragraph of Schaefer's complaint stated "[t]hat the Court should declare said Maryland statute unconstitutional and order election agencies and officials to proceed in (continued)

Upon the submission of affidavits by all parties (including expert testimony) and full briefing of the equal protection issue, the Circuit Court held an expedited hearing on July 8, 1986 to consider Schaefer's request for an interlocutory injunction. Following the hearing, Judge James C. Cawood, Jr. issued an oral opinion that analyzed the submitted authorities, concluded that it was not unconstitutional to use an alphabetical listing on the ballot, and held that the candidate was not reasonably likely to succeed on the merits of his claim. Although

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a manner consistent with plaintiff's constitutional rights herein," it is clear that neither the parties nor the circuit court treated the proceedings below as a declaratory judgment action. Schaefer did not invoke the Maryland Declaratory Judgment Act, Md. Code, Courts and Judicial Proceedings Article, §3-401, et seq., or comply with its terms, particularly with respect to notice, parties and allegations, see §3-405 and §3-409. As a result, the trial court did not issue a judgment declaring the rights of the parties, which Maryland law requires in a true declaratory judgment action. See Courts and Judicial Proceedings Article, §3-411; Broadwater v. State, 303 Md. 461, 469, 494 A.2d 934, 938 (1985).

Schaefer could have immediately appealed the denial of interlocutory relief under Md. Code, Cts. & Jud. Proc. Art., §12-303(c)(3) and actually considered an expedited appeal (R. 228), he declined to do so.

Subsequently, the State moved for summary judgment in Schaefer's action for permanent injunctive relief, submitting no new further affidavits or evidence. The candidate opposed the motion on the grounds that "there exists a question of fact, i.e., is there a preference or advantage to being listed in any particular place on a ballot listing of candidates"; and that the State had failed to show a compelling interest as to the statement of facts before the court. However, he too submitted no additional evidence and asked the Court to rule on the papers before it. On August 28, 1986, Judge Cawood granted the State's motion, noting that "[a]lphabetical order has been commonly

accepted for lists of people since the history of the alphabet, and was the way all or almost all ballots were originally set up"; that the fact that some statistical advantage may at some time accrue to one of the candidates would not invalidate Maryland's ballot arrangement law; and that "[w]hether applying a 'rational basis' or 'strict scrutiny' test, we think the Maryland system of alphabetical listing passes constitutional muster." A.J.S. at A-2 and A-3.

On September 1, 1986, Schaefer filed a routine appeal with the Court of Special Appeals. On September 9, the primary election was held. Linda Chavez won the Republican nomination for U. S. Senate with more than 100,000 votes; Schaefer, a political unknown in Maryland, finished second out of eleven candidates with 16,902 votes -- largely on the basis of the similarity of his name with that of the

successful Democratic candidate for Governor, William Donald Schaefer.

On May 1, 1987, the Court of Special Appeals issued an opinion holding that "[b]ased on the particular remedy sought ... no controversy currently exists between the parties; no effective remedy is possible; and the question raised has become moot." A.J.S. at A-7. The Court added that "[i]f, by happenstance, the issue ever again arises, there would be no difficulty in having it resolved in a timely fashion as a viable issue." Id. at A-9. The Court's order noted "Appeal dismissed. Costs to be paid by Appellant." Id.

On May 26, 1987, Schaefer moved the Court to reconsider its decision, arguing only that the case had not become moot. This motion was denied on June 2, 1987. On the same day the Court's mandate issued with a statement of $1,069.20 in costs, most of

which consisted of the expenses of printing briefs and record extracts. The largest item was $705.60 for printing materials which the State included in its record extract because Schaefer declined to include them in his own.

Appellant filed a petition for certiorari in the Court of Appeals, asking the Court to review the issues of the constitutionality of the alphabetical listing statute and of the mootness of his claim. In addition, Schaefer, for the first time, sought review of the issue of whether "costs in a proceeding of this nature [were] properly charged to plaintiff personally." In a "supplemental" memorandum filed several days later, the candidate argued that the award of costs had a chilling effect on his First Amendment right to petition the government. On September 9, 1987, the Court denied Appellant's petition for certiorari.

I. Appellant's action to enjoin as unconstitutional Maryland's alphabetical listing of candidates in the September 1986 primary was properly dismissed as moot.

It is Appellant's position that an election law challenge can never become moot, J.S. at 11, and that such controversies are always "capable of repetition yet evading review" within this Court's long recognized exception to the mootness doctrine. See Storer v. Brown, 415 U.S. 724, 737, n. 8 (1974). He also now asserts that he "may" be a candidate again in the future and that this is enough to render his ballot arrangement challenge presently justiciable. J.S. at 11. These contentions are simply erroneous.

Election law challenges seeking only injunctive relief for a single election can be found moot. See Love v. Griffith, 266 U.S. 32, 34 (1924); Salera v. Tucker, 399 F.Supp. 1258, 1262 (E.D.Pa. 1975), aff'd on other grounds sub. nom. Tucker v. Salera, 424 U.S. 959 (1976). Moreover, the holding of

the election coupled with the absence of class representation and the lack of "evidence" of an intention to seek future office could result in a finding of mootness. Salera v. Tucker, supra, 399 F.Supp. at 1262, n. 4.

It was not just the holding of the September 1986 primary that led the Court of Special Appeals to conclude that Schaefer's appeal was moot, but also "the particular relief sought." A.J.S. at A-7. He asked only for an injunction with respect to the 1986 election, not future elections. He did not seek or obtain a declaratory judgment. Furthermore, Schaefer brought his action solely in his own name and for the benefit of his 1986 candidacy, not as a class action on behalf of supporters or voters. And, despite his asserted interest in a future candidacy, he passed up the opportunity to be a

candidate in the 1988 elections in Maryland, including another U. S. Senate race.

It is also noteworthy that this was not a ballot access case with an impact on voting rights, but a ballot arrangement challenge, of singular interest to the individual candidate. Such a challenge is so intertwined with facts peculiar to each election, that even if Schaefer's constitutional claim had some merit, the allegedly unconstitutional conduct would not continue from election to election. 2/ These factual variances, coupled with the clarity of §16-5(a)'s provisions, undercut the likelihood that continuance of Schaefer's action "will have the effect of simplifying future challenges," Storer v. Brown, supra, 415 U.S. at 737, n. 8.

---

2 In his complaint in the Circuit Court, Appellant conceded that the so-called advantage of top-of-the-ballot listing varied "depending on the visibility of the office, and the number of candidates seeking said office."

Finally, this is not a case where the Maryland appellate courts have placed "hinderances in the way" of taking up federal constitutional issues, Love v. Griffith, supra, 266 U.S. at 34, or one that will necessarily evade appellate review. The candidate could have sought expedited review of the Circuit Court's July 8, 1986 decision to deny an interlocutory injunction, but simply declined to do so. For all of these reasons, the Court of Special Appeals correctly concluded that Schaefer's injunction action was moot. Similarly, this Court should dismiss Appellant's appeal as moot.

II. No substantial equal protection question is raised by the application of Maryland's statutory requirement that the names of candidates for elected office be arranged alphabetically on the ballot.

Appellant has pointed out that the way in which candidates are listed on the ballot varies among the states. Thus, he concludes,

"[t]here is inconsistency in federal elections." J.S. at 5. However, the mere fact that there are differences among the states in the manner in which federal officials are elected raises no constitutional issue. Indeed, the Constitution clearly sanctions such differences as an element of the federal system. Thus, Article II, Sec. 1, Cl. 2 provides for the appointment of Presidential Electors by each state "in such manner as the Legislature thereof may direct." Similarly, the Constitution provides that subject to the overriding power of Congress, "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." Art. I, Sec. 4, Cl. 1. Of course, the states' exercise of this broad, residual power to regulate the election of federal officials is subject to the various limitations of the

federal Constitution, including the Equal Protection Clause.

Although the Fourteenth Amendment forbids the states to deny to any person the Equal Protection of the Laws, it is an elementary principle of constitutional law that this clause does not flatly forbid the states to make distinctions. Ordinarily, a distinction or classification must simply be rationally related to a legitimate State interest. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Of course, where a distinction involves a suspect classification or fundamental right, it is subject to strict scrutiny and must serve a compelling State interest. Plyer v. Doe, 457 U.S. 202, 216-217 (1982). Although the right of qualified voters to cast their ballots has been regarded as fundamental of this Court and is clearly related to the right to run for public office, this Court has not found the

right to run for public office to be itself a fundamental right. Bullock v. Carter, 405 U.S. 134, 142-144 (1972) and Clements v. Fashing, 457 U.S. 957, 963 (Court's Opinion) and 977, n. 2 (Dissent) (1982). Moreover, this Court has recognized that a State Legislature may anticipate potential problems in the electoral process, such as voter confusion, so long as it acts reasonably and does not significantly burden constitutionally protected rights. Munro v. Socialist Workers Party, ____ U.S.____, 107 S.Ct. 533, 538 (1986).

With respect to ballot position cases, the lower federal courts have consistently applied a rational basis standard. McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980), Krasnoff v. Hardy, 436 F.Supp. 304, 308 (E.D.La. 1977), and Clough v. Guzzi, 416 F.Supp. 1057, 1066-1067 (D.Mass. 1976). Indeed, the Court of Appeals for the Seventh

Circuit has required a showing of intentional discrimination and actual disadvantage. Board of Election Commissioners v. Libertarian Party, 591 F.2d 22, 24-25 (7th Cir. 1979), cert. denied 442 U.S. 918 (1979). In the latter case, it was recognized that a state had a legitimate interest in making the ballot as convenient and intelligible as possible for the great majority of the voters. Id. at 27.

Although Schaefer claims that the only clear interest served by listing the candidates in alphabetical order is the convenience of election officials, J.S. at 5, this is manifestly untrue. An alphabetical listing clearly assists voters in finding the name of the candidate of their choice. This is especially so when, as was the case of Appellant's race, there is a sizeable field of candidates on a crowded ballot. Moreover, Schaefer's second place finish in a field of

eleven candidates suggests that his candidacy was not burdened by the alphabetical listing of his name on the ballot. Any burden which might occur is clearly outweighed by the State's interest in assisting voters in expressing their choice.

Because Appellant has not shown that the decision below conflicts with any decision of this Court or that any conflict among state or federal courts exists with respect to the constitutionality of an alphabetical listing requirement for candidates, his appeal should be dismissed for failure to state a substantial federal question.

III. The candidate's First Amendment challenge to the payment of appeal costs does not properly present a substantial federal question.

There are many reasons why Appellant's attempt to immunize himself from the payment

of appeal costs is not worthy of this Court's attention.

First, even though a court rule may be deemed a state "statute" for purposes of 28 U.S.C. §1257(2), see In re Griffiths, 413 U.S. 717 (1973), Schaefer has not sufficiently drawn into question the constitutionality of Maryland Rule 1082a, but has simply asserted a cliam of First Amendment right. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 562, n. 4 (1980). In fact, he did not even cite the Rule to this Court or the Court of Appeals of Maryland. Thus, Appellant cannot appeal this issue by way of 28 U.S.C. §1257(2).

Second, following a judgment against him in the Court of Special Appeals (including costs), Schaefer filed a motion for reconsideration, but still did not raise the issue of a claimed First Amendment right to shift the costs of his appeal to the State. He did

not ask the intermediate appellate court to exercise its discretion under Rule 1082a to withhold or divide costs or to find under Rule 1082c that the State had included unnecessary matter in a record extract. The constitutional issue was raised for the first time in a petition for certiorari denied by the Court of Appeals. There is no language in any opinion or order indicating that the constitutional issue was considered or disposed of. For this reason, Schaefer's appeal should be dismissed.

Third, even if the First Amendment claim were properly presented, it is wholly insubstantial. At issue is $1,069.20, a portion of which consisted of Appellant's filing fees and briefing costs and other charges necessary to present his appeal. The largest component is the cost of a record extract prepared by the State because of Schaefer's refusal to include certain

requested material in his filing. This dispute, however, could have been resolved by resort to mechanisms in the Maryland Rules of Procedure. See Rule 1082c.

Fourth, even though the First Amendment right to petition includes the right of access to the courts, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), no case of this or any other court holds that the First Amendment protects a litigant from paying court costs. The only decision cited by Appellant, City of Long Beach v. Bozek, 31 Cal.3d 527, 183 Cal.Rptr. 86, 645 P.2d 137 (1982), undercuts his position. While holding that the First Amendment bars a governmental action for malicious prosecution, the Supreme Court of California notes that, from a constitutional standpoint, an award of expenses is a clearly preferable remedy to an independent action for malicious prosecution. 645 P.2d at 143.

Finally, Appellant, a hotel owner and lawyer, J.S. at 3, is not indigent and clearly could afford to pay for the appeal costs assessed.

CONCLUSION

For all of the above reasons, the State urges that its motion to dismiss be granted and that Schaefer's appeal be dismissed for lack of jurisdiction or, alternatively, for want of a substantial federal question.

Respectfully submitted,

J. JOSEPH CURRAN,
Attorney General

RICHARD E. ISRAEL,

ROBERT A. ZARNOCH,
(Counsel of Record)

Assistant Attorneys General

90 State Circle
Annapolis, Maryland 21401
(301) 858-3889

Attorneys for Appellees

(b) Before admission to the bar, each applicant shall be passed upon by the committee in his district as to his good moral character and general fitness to practice law. He shall furnish the committee with an affidavit in such form as the Board of Law Examiners shall prescribe concerning the history. Each applicant shall appear before the committee of his district or some member thereof and shall furnish the committee such evidence of his good moral character and general fitness to practice law as in the opinion of the committee would justify his admission to the bar.

(c) If the committee is of the opinion that the applicant is of good moral character and general fitness to practice law, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar. If the committee is not of that opinion, it shall file with the Board of Law Examiners a statement that it cannot so certify, together with a report of its findings and conclusions.

(d) An applicant who has availed himself of his full hearing rights before the Committee on Character and Fitness and who deems himself aggrieved by the determination of the committee may, on notice to the committee, petition the Supreme Court for relief.

Supreme Court Rule 709. **Power to Make Rules.**

(a) Subject to the approval of the Supreme Court, the Board of Law Examiners and the Committee on Character and Fitness shall have the power to make, adopt, and alter rules not inconsistent with this rule, for the proper performance of their respective functions.

Illinois Supreme Court Rules on "Admission and Discipline of Attorneys", Chapter 110A, *Illinois Revised Statutes* , Section 708 (c) (eff. August 1, 1987, as amended):

Supreme Court Rule 708. Committee on Character and Fitness

> (c) If the committee is of the opinion that the applicant is of good moral character and general fitness to practice law, it shall so certify to the Board of Law Examiners and the applicant shall thereafter be entitled to admission to the bar unless the court orders otherwise. If the committee is not of that opinion, it shall file with the Board of Law Examiners a statement that it cannot so certify, together with a report of its findings and conclusions.

Rules of Procedure, Character and Fitness Committee of the Supreme Court of Illinois, First District:

> *Rule 3. Initial Review of Questionnaire.*
> When the questionnaire shall been (sic) substantially processed, it shall be reviewed by the Administrator or an Examiner and if no adverse matters bearing on the Applicant's Character and fitness are apparent, the Administrator shall certify the Applicant to the Board for Admission to the Bar. In the event that Applicant is not so approved for certification, the Chairman shall assign the application, consisting of Applicant's original and supplemental questionnaires and supplemental documents, to an Inquiry Panel of the Committee for further review and examination.
>
> *Rule 4.3* The Inquiry Panel may certify an Applicant only by an unanimous vote, upon which the Secretary shall be promptly so notified in writing.
>
> *Rule 4.4* In the event the Inquiry Panel has not voted to certify the Applicant, the Secretary shall thereupon be so advised, including a report of the findings of adverse matters, and the Chairman shall thereupon impanel a Hearing Panel, none of whom shall have been members of the Inquiry Panel considering the Applicant, to formally consider the application upon a date certain.

Rule 5. Hearing Panels.

Rule 5.1 The Hearing Panel shall consist of seven members of the Committee, including the Chair-Person as designated by the Chairman...

Rule 5.2 Upon impaneling the Hearing Panel, the Secretary shall notify the Applicant by certified mail of:

(a) The date, time and place of such hearing;

(b) The matters adverse to Applicant, as specified by the Inquiry Panel;

(c) If such adverse matters were based in full or in part upon statements from other persons, the names of such persons;

(d) The Applicant's rights to be represented by counsel, to examine and cross-examine witnesses, to adduce evidence bearing on the aforesaid adverse matters and upon the Applicant's moral character and fitness, and for such purpose to make reasonable use of the Committee's subpoena powers under Rule 7 and shall also supply the Applicant with a copy of these rules.

Rule 5.3 The hearings before the Hearing Panel shall be private... conducted in a formal manner, with the Applicants' (sic) having the rights heretofore referred to. The Chairman shall appoint counsel from among members of the Bar (including members of the staff of the Attorney Registration and Disciplinary Commission) to prepare and present the matters adverse to the Applicant. The burden of proof shall be on the Applicant to establish his good moral character and fitness. The Hearing Panel shall not be bound by the formal rules of evidence; it may in its discretion take evidence in other than testimonial form, having the right to rely upon records and other materials furnished to the Hearing Panel in response to its requests for assistance

in its inquiries pursuant to these rules and Supreme Court Rule 709; and it may further in its discretion determine whether any evidence to be taken in testimonial form shall be taken in person at the hearing or upon deposition, but all testimonial evidence shall in either event be taken under oath. The matters to be considered by the Hearing Panel need not be limited to the matters of concern set forth in the notice to the Applicant of the matters adverse to the Applicant...

Rule 5.5 If the Hearing Panel shall vote to certify any Applicant, the Secretary shall promptly be so notified, in writing.

Rule 5.6 If, after a hearing, the Hearing Panel is not prepared to certify the Applicant, it shall deliver a report of his findings and conclusions to the Secretary and the Board, with a copy being furnished to the Applicant.

Rule 6.1 The secretary shall notify each Applicant who has been certified promptly after such action.

Rule 6.2 Each certification of an Applicant for admission on examination prior to the announcement of the result of such examination, who fails to pass such examination, shall be a tentative certification..

APPENDIX G

February 17, 1986 Letter

APPENDIX G

February 17, 1986 Letter

* * * * *

Committee on Character and Fitness
By Appointment of the Illinois Supreme Court
203 North Wabash, #2100
Chicago 60601
(312) 236-1743

February 17, 1986

Mr. Edward Anthony Loss, III
83 Sandhurst Road
Mundelein, Illinois 60060

Dear Mr. Loss:

Please be advised that the Hearing Panel for the Committee on Character and Fitness, First Judicial District, has recommended that you be Certified by the Committee for admission to the Illinois Bar.

There will be a period of one week to 10 days for paperwork on the Certification to clear the proper offices, after which I will notify you of the clearance and the procedure for being sworn in at the earliest date.

Yours very truly,

_____

(Mrs.) Mary J. Lampman
Secretary

MJL/lm

cc: William Haddad, Esq.
Committee File

APPENDIX H

Order of October 30, 1987

APPENDIX H

Order of October 30, 1987

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DOCKET NO. M.R. 3972

IN THE
SUPREME COURT OF ILLINOIS

In re:	)
	)
EDWARD A. LOSS III,	)
	)
Petitioner.	)

O R D E R

This cause coming to be heard on a motion of William J. Haddad, and two motions by the petitioner, and the court being fully advised in the premises:

(1) • • •

(2) IT IS FURTHER ORDERED that Loss' motion to stay this court's mandate pending timely filing and disposition of a petition for a writ of certiorari in the Supreme Court of the United States is allowed.

(3) IT IS FURTHER ORDERED that Loss' motion to supplement the record with the contents of alleged informal communications is denied, that matter being fully addressed by Justice Ryan in his special concurring opinion filed September 2, 1987, in which Chief Justice Clark, Justice Moran and Justice Miller joined.

Justice Ward, heretofore not participating in this cause, joins in this order.

Justice Simon, concurring in part and dissenting in part from the order of October 30, 1987:

For the reasons stated in my dissent to the court's June 4, 1986 order, my dissent to the amendment of Rule 708 (c) filed on April 10, 1987, and my dissent to the majority opinion filed on August 17, 1987, I believe that the requests made by the movant in his Motion to Supplement the Record With The Contents Of Alleged Informal Communications filed on September 4, 1987 are proper and that his motion should be allowed. I therefore dissent from the denial of that motion, but concur in the portion of the court's order allowing attorneys fees and expenses and staying the mandate.